

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
EASTERN WASHINGTON REGION
STATE OF WASHINGTON

WES HAZEN, et al.,

Petitioners,

v.

YAKIMA COUNTY,

Respondent,

And,

FRIENDS OF THE WENAS; COLUMBIA
READY-MIX; YAKIMA COUNTY FARM
BUREAU, INC., YAKIMA COUNTY
CATTLEMEN'S ASSOCIATION, CENTRAL
PRE-MIX CONCRETE COMPANY,

Intervenors.

Case No. 08-1-0008c

**PARTIAL COORDINATED
COMPLIANCE ORDER AND ISSUANCE
OF STAY**

Issue 2: Critical Aquifer Recharge Areas
Issue 6: Critical Areas Exemptions
Issue 14: Non-Farm Accessory Uses
Issue 15: Aquatic Critical Areas

WES HAZEN, UPPER WENAS
PRESERVATION ASSOCIATION AND
FUTUREWISE,

Petitioners,

v.

YAKIMA COUNTY,

Respondents,

And,

YAKIMA COUNTY FARM BUREAU,

Intervenor.

Case No. 09-1-0014

COORDINATED COMPLIANCE ORDER

Issue 2: Administrative Discretion
Issue 4: Critical Areas Exemptions

I. SYNOPSIS

These coordinated cases involve the designation and protection of Critical Aquifer Recharge Areas (CARAs), Critical Area Ordinance Exemptions, designation of LAMIRDs, Non-Farm Accessory Uses, Aquatic Critical Areas, and Administrative Discretion. Because judicial review is pending in the Court of Appeals, the Board issues a **stay of compliance** proceedings in the matter of Aquatic Critical Areas (Case 08-1-0008c, Issue 15). With adoption of Ordinance 1-2011 and Ordinance 2-2011, the Board finds the County in **compliance** in Issue 14, Case 08-1-0008c and Issue 2, 09-1-0014. In CARAs Issue 2, 08-1-0008c; the Board finds **compliance** in the County's provisions to protect CARAs; however, the County is in continuing **non-compliance** as to the GMA's requirement to include and substantively consider Best Available Science in designating and mapping CARAs used for potable water. Because Yakima County has not *adopted* legislation as to its Critical Area Ordinance Exemptions the Board finds the County in **non-compliance** in Issue 6, Case 08-1-0008c and Issue 4, Case 09-1-0014.

II. BACKGROUND AND PROCEDURAL HISTORY

In 2008, several Petitions for Review (PFR) were filed with the Eastern Washington Growth Management Hearings Board (Board) in relationship to amendments enacted by Yakima County to its Critical Areas Ordinance (CAO) via Ordinance 13-2007 and Ordinance 15-2007. These petitions were consolidated and the subject of various settlement negotiations. However, because not all issues were resolved during these negotiations, on April 5, 2010, the Board issued its Final Decision and Order (FDO) in the matter of *Wes Hazen, et al v. Yakima County*, Case No. 08-1-0008c.¹ With this FDO, the Board determined Yakima County had failed to comply with the Growth Management Act, RCW 36.70A (GMA), in relationship to the following:

- Issue 2: Critical Aquifer Recharge Areas (CARAs) – Designation and Protection
- Issue 6: Critical Areas Ordinance (CAO) Exemptions
- Issue 10: Limited Areas of More Intensive Rural Development (LAMIRD)

¹ The only petitioners remaining in Case 08-1-0008c were the Yakama Nation and Wes Hazen, Upper Wenas Preservation Association, and Futurewise (collectively Futurewise).

Issue 14: Non-Farm Accessory Uses of Agricultural Resource Land
Issue 15: Aquatic Critical Areas – Type 5 Streams, Buffers, and Buffer Adjustments

The Board remanded the challenged ordinances to the County to take legislative action to achieve compliance by October 4, 2010, which was later extended to February 1, 2011.² Subsequently, Yakima County and Intervenor Yakima Farm Bureau filed appeals of the Board's April 2010 FDO in Yakima County Superior Court, consolidated under Cause No. 10-2-01392-9. Of the areas the Board determined non-compliant, the court appeal related only to Issue 6, Issue 14, and Issue 15.

While review was pending before the Board in regards to Case 08-1-0008c, in 2009 a new PFR was filed challenging several amendments the County had adopted to its CAO via Ordinance 2-2009 as a result of the settlement negotiations in Case 08-1-0008c. On June 14, 2010, the Board issued its FDO in the matter of *Wes Hazen, et al v. Yakima County*, Case No. 09-1-0014. With this FDO, the Board determined Yakima County had failed to comply with the GMA in relationship to the following:

Issue 2: Discretion of Administrative Official
Issue 4: Critical Areas Ordinance (CAO) Exemptions

The Board remanded the challenged ordinance to the County to take legislative action to achieve compliance by December 14, 2010. No party sought review of the Board's June 2010 FDO in the courts.

On January 4, 2011, a Stipulated Motion for Extension of Compliance Dates was filed with the Board for the two cases. Given the interwoven nature of these cases, the Board coordinated the compliance proceedings so as to allow for efficiency in their disposition, and granted an extension for compliance to be due February 2, 2011.³

On February 11, 2011, the Board received Yakima County's Status of Compliance with FDO and its Index of Compliance setting forth actions it has taken in regards to both matters.

² August 17, 2010 Order Granting Motion to Extend.

³ See Order Granting Extension of Compliance Period, January 7, 2011.

1 On February 25, 2011, the Board received Futurewise's Objections to a Finding of
2 Compliance.

3 On March 7, 2011, the Board received Yakima County's Response to Futurewise's
4 Objections.

5
6 On March 15, 2011, the Board held a telephonic compliance hearing for these coordinated
7 matters. Board members Joyce Mulliken, Nina Carter, and Raymond Paoella attended;
8 Board member Mulliken presiding. Jill Smith appeared on behalf of Futurewise,
9 representing the interests of Wes Hazen, Upper Wenas Preservation Association, and itself.
10 Paul McIlrath appeared on behalf of Yakima County and Sam Rodabough appeared on
11 behalf of Intervenor Yakima Farm Bureau.

12 At the March 15th Compliance Hearing, Yakima County conceded it had not adopted
13 legislation by the established compliance deadlines⁴ but had recently adopted two
14 ordinances intended to achieve compliance with the GMA on some issues as denoted in the
15 Board's April 2010 and June 2010 FDOs – Ordinance 1-2011 (adopted March 4) and
16 Ordinance 2-2011 (adopted March 15). Since the petitioners did not have an opportunity to
17 review the enacted legislation, the Board continued the matter, requested the County
18 electronically file signed, executed copies of the ordinances, and allowed the parties to file
19 supplemental briefing.⁵

20 The County promptly filed copies of the ordinances and supplemental briefing was received
21 from Futurewise and Yakima Farm Bureau on March 29, 2011, with a response filed by
22 Yakima County on April 5, 2011.⁶

23 ⁴ February 1, 2011 for Case 08-1-0008c and February 2, 2011 for Case 09-1-0014.

24 ⁵ March 16, 2011 Board letter to the parties.

25 ⁶ Wes Hazen, Upper Wenas Preservation Association, and Futurewise's Objections to a Finding of
26 Compliance, filed March 29, 2011 (Futurewise's Supp. Objections); Yakima County Farm Bureau's
Supplemental Brief RE: Finding of Compliance, filed March 29, 2011 (Farm Bureau Supp. Brief); Yakima
County's Follow-up Response to Futurewise's Second Brief Objecting to a Finding of Compliance, filed April 5,
2011 (County's Supp. Response).

1 On April 19, 2011, the Board held a telephonic compliance hearing in relationship to the
2 continued matters. The same individuals attending the March 15th compliance hearing were
3 present for this continued hearing.

4 At the April 19, 2011 continued hearing, it was determined by the Board that supplemental
5 evidence was needed as to Yakima County's action taken in relationship to Issue 10 –
6 LAMIRDs, specifically the designation of the Buena area as a Type 1 LAMIRD and its 1990
7 “built environment.” Therefore, the Board bifurcated Issue 10 and stated it would issue a
8 separate Compliance Order on that issue by May 10, 2011.

9 **III. STANDARD OF REVIEW**

10 In compliance proceedings, the presumption of validity continues to apply and the burden
11 remains on the challenger to establish the new adoption is clearly erroneous in view of the
12 entire record before the Board and in light of the goals and requirements of this chapter.⁷

13 In reviewing Yakima County's planning decisions during these compliance proceedings, the
14 Board is instructed to recognize the “broad range of discretion that may be exercised” and
15 to “grant deference to counties” in how they plan for growth.⁸ However, Yakima County's
16 actions are not boundless; those actions must be consistent with the goals and
17 requirements of the GMA.⁹

18 **IV. COMPLIANCE ISSUES**

19 In response to the Board's April 2010 FDO and June 2010 FDO, the County adopted two
20 ordinances. Ordinance 1-2011 puts in place amendments to the Critical Areas Ordinance
21 (CAO), Yakima County Code (YCC) Title 16C, and the County's Comprehensive Plan 2015.
22 Ordinance 2-2011 puts in place amendments to the Comprehensive Plan 2015 and YCC
23 Title 15 related to Rural Settlement Lands. Because of the appeal to the Court, Yakima

24 ⁷ RCW 36.70A.320(1), (2), and (3).

25 ⁸ RCW 36.70A.3201.

26 ⁹ *King County v. CPSGMHB*, 142 Wn.2d 543, 561 (2000); *Swinomish Tribe, et al v. WWGMHB*, 161 Wn.2d 415, 435 Fn. 8 (2007).

1 County took no action in relationship to the CAO Exemptions (Issue 6 in 08-1-0008c and
2 Issue 4 in 09-1-0014) and Aquatic Critical Areas (Issue 15 in 08-1-0008c).

3 Prior to specifically addressing the issues, the Board must remind the County the
4 compliance date established in the Board's FDO is the *deadline* by which the legislative
5 action is to be taken. That is, an ordinance putting in place remedial policies or regulations
6 must be formally adopted by the County by this deadline. Compliance is not achieved by
7 taking steps; compliance is determined only after the jurisdiction has taken action through its
8 governing body by adopting ordinances or resolutions which implement the GMA.¹⁰

9 **Issue 2: Critical Aquifer Recharge Areas – Designation and Protection**

10 Petitioners alleged in their February 2008 Petition for Review that Yakima County violated
11 the GMA, including *inter alia* RCW 36.70A.060, 36.70A.170, and 36.70A.172, when
12 adopting Ordinance 13-2007 and Yakima County Code Chapter 16C.09 because the
13 County failed to designate and protect Critical Aquifer Recharge Areas (CARAs) as Critical
14 Areas. In the Final Decision and Order issued on April 5, 2010, the Board found and
15 concluded that Yakima County failed to comply with the requirements of RCW
36.70A.172(1) and RCW 36.70A.060(2) to designate and protect CARAs.

16 **Applicable Law**

17 RCW 36.70A.170(1) requires each county and each city to designate "critical areas." RCW
18 36.70A.030(5) defines "critical areas" as including the following areas and ecosystems:

- 19 (a) wetlands;
- 20 (b) areas with a critical recharging effect on aquifers used for potable water;
- 21 (c) fish and wildlife habitat conservation areas;
- (d) frequently flooded areas; and
- (e) geologically hazardous areas.

23 ¹⁰ *Kittitas County Conservation, et al v. Kittitas County*, Case No. 07-1-0004c, 1st Compliance Order at 12
24 (August 7, 2008) and 3rd Compliance Order at 7 (Sept. 18, 2009)(Compliance is not founded on working
25 copies, proposed drafts, or good faith); *Concerned Friends of Ferry County v. Ferry County*, Coordinated
26 Cases 97-1-0018, 01-1-0019, 04-1-0007c, 06-1-0003 Compliance Order (June 9, 2008)(Compliance not
warranted when county is currently conducting legislative process but has not completed the work).

1 RCW 36.70A.060(2) provides that each county and city shall adopt development regulations
2 that protect designated critical areas. In designating and protecting critical areas, RCW
3 36.70A.172(1) requires that “counties and cities shall include the best available science in
4 developing policies and development regulations to protect the functions and values of
5 critical areas. In addition, counties and cities shall give special consideration to conservation
6 or protection measures necessary to preserve or enhance anadromous fisheries.”¹¹

7 Evidence of the best available science (BAS) must be included in the record and must be
8 considered substantively in the development of critical areas policies and regulations.¹²

9 “Although BAS does not require the use of a particular methodology, at a minimum BAS
10 requires the use of a scientific methodology.”¹³ Although a county need not develop
11 scientific information through its own means, it must rely on scientific information and must
12 analyze that information using a reasoned process.¹⁴

13 RCW 36.70A.170(2) provides that in making critical areas designations, counties and cities
14 shall consider the guidelines established by the Department of Commerce pursuant to RCW
15 36.70A.050(1). These are “minimum guidelines” that apply to all jurisdictions “to guide the
16 classification” of critical areas.¹⁵

17 **Critical Aquifer Recharge Areas** are defined in WAC 365-190-030(3) as “areas with a
18 critical recharging effect on aquifers used for potable water, including areas where an
19 aquifer that is a source of drinking water is vulnerable to contamination that would affect the
20 potability of the water, or is susceptible to reduced recharge.” WAC 365-190-100 provides,
21 in excerpted part, the following guidelines for designating critical aquifer recharge areas:

22 (1) Potable water is an essential life sustaining element for people and many
23 other species. Much of Washington's drinking water comes from groundwater.

24 ¹¹ RCW 36.70A.172(1).

25 ¹² *Honesty in Env'tl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn.
26 App. 522, 532, 979 P.2d 864 (1999).

¹³ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d. 837 (2005).

¹⁴ *Id.* at 836-837.

¹⁵ RCW 36.70A.050.

1 Once groundwater is contaminated it is difficult, costly, and sometimes
2 impossible to clean up. Preventing contamination is necessary to avoid
3 exorbitant costs, hardships, and potential physical harm to people and
4 ecosystems.

5 (2) The quality and quantity of groundwater in an aquifer is inextricably linked to
6 its recharge area. Where aquifers and their recharge areas have been studied,
7 affected counties and cities should use this information as the basis for
8 classifying and designating these areas. Where no specific studies have been
9 done, counties and cities may use existing soil and surficial geologic information
10 to determine where recharge areas exist. To determine the threat to groundwater
11 quality, **existing land use activities and their potential to lead to**
12 **contamination should be evaluated.**

13 (3) **Counties and cities must classify recharge areas for aquifers according**
14 **to the aquifer vulnerability.** Vulnerability is the combined effect of
15 hydrogeological susceptibility to contamination and the contamination loading
16 potential. High vulnerability is indicated by land uses that contribute directly or
17 indirectly to contamination that may degrade groundwater, and hydrogeologic
18 conditions that facilitate degradation. Low vulnerability is indicated by land uses
19 that do not contribute contaminants that will degrade groundwater, and by
20 hydrogeologic conditions that do not facilitate degradation. Hydrological
21 conditions may include those induced by limited recharge of an aquifer. Reduced
22 aquifer recharge from effective impervious surfaces may result in higher
23 concentrations of contaminants than would otherwise occur. . . .

24 (4) A classification strategy for aquifer recharge areas should be to maintain the
25 quality, and if needed, the quantity of the groundwater, with particular attention to
26 recharge areas of high susceptibility. . . .¹⁶

18 In order to protect public health and prevent harm to people from drinking contaminated
19 water, the GMA requires a two-step process for Critical Aquifer Recharge Areas: (1)
20 **designate** CARAs, and (2) adopt regulations to **protect** CARAs. As per WAC 365-190-100,
21 some basic locational information for aquifer recharge areas needs to be acquired in order
22 to determine which areas are "critical" to preventing adverse impacts to the aquifer.
23 Counties and cities should rely primarily on performance standards to protect critical areas;

24
25 ¹⁶ Emphasis added.

counties and cities should apply performance standards to protect critical areas when a land use permit decision is made.¹⁷

Board Discussion and Analysis

- ***Designation***

In the April 5, 2010 FDO, the Board concluded:

Yakima County's reliance on outdated science to initially map its CARAs violates the RCW 36.70A.172(1) requirement for current BAS to be included in the designation of critical areas and the YCC 16C.09.02(1) statement as to continued reliance on Ecology's Publication 97-30 compounds the County's failure.

Since April 5, 2010, the County has adopted Ordinance 1-2011 (effective March 9, 2011), amending YCC Chapter 16C.09 on CARAs to adopt new designation and protection standards, but the record does not reflect any recent updates or revisions to the initial CARA designation map itself.

Under the GMA, land areas must be designated as CARAs based upon the aquifer's vulnerability to contamination from land use activities. In order to protect public health and the environment,¹⁸ and to prevent contamination of potable drinking water supplies, the GMA requires the County to analyze the risk that existing land use activities could lead to ground water contamination. Such a risk analysis forms the basis for designation and protection of specific, science-based CARAs.

In this case, Petitioners have offered some evidence of groundwater contamination in certain localized areas of Yakima County, including for example, perchloroethylene, pesticides, heavy metals, and nitrates,¹⁹ together with evidence of efforts by the U. S. Environmental Protection Agency and Washington State Department of Ecology to address drinking water contamination issues in Yakima Valley groundwater.²⁰

¹⁷ WAC 365-190-080(4)(a).

¹⁸ See RCW 36.70A.020(10).

¹⁹ See Petitioners Hazen's and Futurewise's Hearing on the Merits Brief, pages 8-9 (January 27, 2010).

²⁰ See Petitioners Hazen's and Futurewise's Reply Brief, page 4 (March 4, 2010).

1 WAC 365-190-080(4) states that counties and cities should designate critical areas by using
2 maps and performance standards, and counties and cities should clearly state that maps
3 showing known critical areas are only for information or illustrative purposes.

4 At the April 19, 2011 Compliance Hearing, Yakima County indicated that it relies primarily
5 on performance standards to protect CARAs (see, e.g., YCC 16C.09.05 and YCC
6 16C.09.06) whereas the County indicated it relies primarily on mapping to designate CARAs
7 (see, e.g., YCC 16C.09.02 and YCC 16C.09.03).

8 In adopting Ordinance 1-2011 (amending YCC Chapter 16C.09), Yakima County deleted
9 the previous referenced outdated Washington Department of Ecology Publication #97-30.
10 However, the CARA map, which was based on older, superseded science, was not
11 reviewed or revised to reflect updated best available science.

12 Without a mapping update to include Best Available Science, the pre-existing CARA
13 designation map does not comply with the GMA. Therefore, the County failed to include and
14 substantively consider Best Available Science in designating and mapping areas with a
15 critical recharging effect on aquifers used for potable water, contrary to RCW 36.70A.172(1).

16 • **Protection**

17 In the April 5, 2010 FDO, the Board concluded that YCC 16C.09 failed to protect the
18 functions and values of its CARAs as required by RCW 36.70A.060(2) and RCW
19 36.70A.172(1). Since April 5, 2010, the County has adopted Ordinance 1-2011 (effective
20 March 9, 2011), amending YCC Chapter 16C.09 on CARAs. This latest ordinance adopts
21 the following new provisions: performance standards (YCC 16C.09.05 and 16C.09.06);
22 CARA use prohibitions (YCC 16C.09.07); development application submittal and reporting
23 requirements (YCC 16C.04 and YCC 16C.03.18); and a definition of “hazardous materials”
24 (YCC 16C.02.061).

1 Although Petitioners objected to the County's CARA designation map, Petitioners did
2 support the County's newly enacted development regulations to protect CARAs, stating that
3 the regulations "substantially improve" protection to CARAs.²¹ The Board finds and
4 concludes that Yakima County's new CARA provisions comply with the GMA's requirements
5 to protect CARAs in RCW 36.70A.060(2) and RCW 36.70A.172(1).

6 **Issue 6 (08-1-0008c) and Issue 4 (09-1-0014): Critical Areas Ordinance Exemptions**

7 With the April 2010 FDO and June 2010 FDO, the Board determined:²²

8 Although exemptions are not prohibited under the GMA, all development
9 regulations, even those for exempt activities, are to be based on BAS and
10 tailored so as to reasonably ameliorate potential harm and address cumulative
11 impacts ...

12 The County points to no science in the Record to support its exemptions so as
13 to prevent the loss or degradation of the associated critical area. Rather, the
14 County contends the administrative review process of YCC 16C.03.06 will
15 assure the functions and values of the critical area will be protected.²³
16 However, it is not the review process but the inclusion of BAS that is
17 imperative when it comes to critical areas.

18 ...
19 Without BAS, the County's exemptions fail to comply with RCW 36.70A.060(2)
20 and 36.70A.172's requirement for the substantive inclusion of BAS within
21 development regulations.

22 ...
23 [C]ertain exemptions set forth Yakima County in YCC 16C.03.07, 16C.03.08,
24 and 16C.03.09 fail to comply with RCW 36.70A.060(2) and 36.70A.172
25 requirements to substantively consider BAS within development regulations.
26 These provisions include YCC 16C.03.07(4)-(6), (8)-(9), (11), (13)-(14), (17),
the entirety of YCC 16C.03.08, and YCC 16C.03.09(b)-(e).

With the June 2010 FDO, the Board cited its holding in Case 08-1-0008c and reiterated:²⁴

²¹ Wes Hazen, Upper Wenas Preservation Association, and Futurewise's Objections to a Finding of
Compliance, pages 4-5 (March 29, 2011).

²² April 2010 FDO at 29-31.

²³ YCC 16C.03.06 sets forth the procedural requirements for the review of exempt activities and uses. This
section of the CAO states that the Administrative Official shall review the exemption and determine if it
complies with Title 16C and permits approval to be conditional.

²⁴ June 2010 FDO at 17

Without any BAS in the Record to justify these changes or the exemptions themselves, these changes further exacerbate the problem. ...

[T]he Board finds and concludes Petitioners carried their burden of proof and the changed exemptions found in the County's CAO at YCC 16C.03.09(a) and (e) are noncompliant with RCW 36.70A.060(2) and RCW 36.70A.172.

The Board's holding in regards to CAO Exemptions was appealed to the Court. In the Court's March 8, 2011 Decision, the Honorable Blaine G. Gibson affirmed the Board's holding stating:²⁵

...the County must demonstrate that the exemptions are based on the BAS, as required by the GMA. Since the County did not do so, the exemptions were properly rejected by the Board ... The Board's determination the County's exemptions for certain development activities violates the GMA is affirmed.

Futurewise points out the County remains out of compliance as it has not actually addressed any of the exemptions found non-compliant in Case 08-1-0008c.²⁶ As for the exemptions addressed in Case 09-1-0014, Futurewise states the County has yet to address YCC 16C.03.09(e) and has merely moved YCC 16C.03.09(a) to YCC 16C.03.05(1)(h), making it applicable to not just Upland Wildlife Habitat but to all critical areas while still failing to address BAS.²⁷

In its response, Yakima County states it has accepted the court's decision and will remove exemptions from its CAO.²⁸ However, as to YCC 16C.03.05(1) new provision, the County contends this very same language previously existed, and it was the addition of "accessory" and "structure" at issue. The County argues this verbiage has been removed, and because the base language was not challenged it is not subject to Board review.²⁹

²⁵ March 8 Decision, at 4-5

²⁶ Futurewise Supp. Objections at 5.

²⁷ Futurewise Supp. Objections at 12-13.

²⁸ County Supp. Brief at 4.

²⁹ County Supp. Brief, at 10.

1 The County has not yet enacted legislation that will repeal the exemptions and therefore
2 remains non-compliant. As for the transferring of YCC 16C.03.09(a)'s provision to YCC
3 16C.03.05(1)(h), the Board has previously determined the County's exemptions were not
4 supported by Best Available Science. Judge Gibson upheld the Board's determination,
5 stating, "...the County must demonstrate that the exemptions are based on the BAS, as
6 required by the GMA."

7 **Conclusion:** Yakima County has failed to take legislative action to achieve compliance with
8 the GMA as determined by the April 2010 FDO and June 2010 FDOs in regards to
9 exemptions contained in YCC Chapter 16C.03. Therefore, the Board issues a **finding of**
10 **continuing non-compliance** in regards to the exemptions within YCC Chapter 16.03.

11 **Issue 10: Limited Areas of More Intensive Rural Development**

12 As noted *supra*, the Board bifurcated this issue from the proceedings to allow for
13 supplemental evidence in relationship to the designation of the Buena area as a Type 1
14 LAMIRD. A separate compliance order will be issued in regards to this issue and, therefore,
15 this issue is not addressed within this Compliance Order.³⁰

16 **Issue 14: Non-Farm Accessory Uses of Agricultural Resource Land**

17 With the April 2010 FDO, the Board determined:³¹

18 RCW 36.70A.177(3) requires accessory uses be located, designed, and
19 operated so as to not interfere with the overall agricultural uses of both the
20 property and neighboring properties, and specifically for non-agricultural
21 accessory uses, limits these uses so they are consistent with the size, scale,
22 and intensity of the existing agricultural use, the use be located within the
23 general area already developed, and no more than one acre of agricultural
24 land is converted to the non-agricultural use. Policy LU-ER-AG 1.5 does not
25 contain this limiting language ... limiting language must be included within the
26 policy or development regulations enacted to ensure compliance with RCW
36.70A.177.

...

³⁰ Discussion and agreement between Parties and Board at continued Compliance Hearing, April 19, 2011.

³¹ April 2010 FDO at 68.

1 [F]ailed to comply with the GMA's mandate for the conservation of agricultural
2 lands as set forth in RCW 36.70A.020(8), .060(1), and .170(1) by allowing
3 non-agricultural accessory uses but without limiting such uses as required by
4 RCW 36.70A.177.

5 Yakima County Farm Bureau appealed the Board's holding to the Yakima County Superior
6 Court; however, the Court's March 8, 2011 Memorandum Decision is silent as to this issue.
7 Despite the court appeal, with Ordinance 1-2011 Yakima County amended Policy LU-ER-
8 AG 1.5 to delete specific uses that may be allowed as accessory uses within agricultural
9 resource lands and further required all new accessory uses must adhere to the
10 requirements of RCW 36.70A.177.

11 Futurewise states the County's amendments achieve compliance as does the Farm
12 Bureau.³²

13 **Conclusion:** The Board finds and concludes Yakima County, with Ordinance 1-2011, has
14 enacted legislation achieving compliance with the GMA in relationship to RCW
15 36.70A.020(8), .060(1), .170(1), and .177. Therefore, the Board issues **a finding of**
16 **compliance.**

17 **Issue 15: Aquatic Critical Areas – Type 5 Streams, Buffers, and Wetland Buffer** 18 **Adjustments**

19 With the April 2010 FDO, the Board determined:³³

20 Given the fact that ephemeral streams play an important role in maintaining
21 the hydrological, biogeochemical, and ecological health of the overall stream
22 corridor system ... Yakima County, by not designating Type 5 Ephemeral
23 Streams as a critical area, is non-compliant with RCW 36.70A.170. In
24 addition, this lack of designation fails to maintain Yakima County's fish and
25 wildlife habitat as contemplated by Plan 2015 Goal NS 17 and therefore
26 creates inconsistency which is prohibited by RCW 36.70A.040.

27 ³² Futurewise Supplemental Objections, at 9; Farm Bureau Supplemental Brief, at 1.

28 ³³ April 2010 FDO at 36 (Type 5 Streams), 45 (Stream Buffers), 50 (Wetland Buffer Adjustment).

1 Yakima County's adopted standard stream buffer widths, as set forth in YCC
2 16C.06.16 Table 6-1, violates RCW 36.70A.060(2) and 36.70A.172(1) as they
3 are not supported by BAS and the County has provided no reasoned
4 justification for departing from BAS.

5 Yakima County, with the adoption of Ordinance 13-2007, YCC 16C.06.16
6 Table 6-1 and Table 6-2, which establishes minimum buffers which may be
7 administratively approved pursuant to YCC 16C.0323 to a width that falls
8 outside the range supported by BAS violates RCW 36.70A.060(2) and
9 36.70A.172(1).

10 Yakima County appealed the Board's FDO to the Yakima County Superior Court.

11 Futurewise has appealed the Superior Court's decision in regards to Type 5 Streams and
12 buffer widths to the Court of Appeals.³⁴ Yakima County and Yakima County Farm Bureau
13 have filed cross-appeals.³⁵ Thus, given the pendency of judicial review in the Court of
14 Appeals, the Board will stay the compliance proceedings as to Issue 15 only. It should be
15 noted this does not bring the County into compliance on those issues under appeal. It
16 means only that the County does not have to take any legislative action on this Issue 15
17 until such time as a final decision is rendered by the Courts.

18 Both Futurewise and Yakima County note the Court's decision is silent as to wetland buffer
19 width adjustments. Futurewise contends this would, at a minimum, mean the Board was not
20 overturned.³⁶ In contrast, the County states this silence would be construed as being
21 decided in the County's favor.³⁷ The Board will not consider this sub-issue while court
22 proceedings are pending.

23 **Conclusion:** Given the pendency of judicial review in the Court of Appeals, the Board
24 issues a **Stay of Compliance Proceedings** in regards to its holdings for Issue 15 as to the
25 Type 5 Streams, Stream Buffers, and Wetland Buffer Width Adjustments.

26 **Issue 2: Discretion of Administrative Official**

³⁴ Docket 29763-2, filed March 8, 2011.

³⁵ Filed with the Court on March 22, 2011.

1 In the June 2010 FDO, the Board determined:³⁸

2 The use of the word “may” in YCC 16C.060(1), as opposed to “shall” or “will,”
3 makes this sentence permissive and provides for essentially unbounded
4 discretion on the part of the Administrative Official ... Such unbounded discretion
5 does not satisfy the GMA’s affirmative duty to protect designated critical areas
6 under RCW 36.70A.060(2) and to include best available science to protect the
7 functions and values of critical areas under RCW 36.70A.172(1) ... Thus, the
8 second sentence of YCC 16C.11.060(1) does not comply with the GMA.

9 ...
10 YCC 16C.11.060(1), as it relates to Administrative Official decisions, is non-
11 compliant with the GMA, RCW 36.70A.060(2) and RCW 36.70A.172(1) ...

12 With Ordinance 1-2011, the County enacted amendments to YCC 16C.11.060 that now
13 requires the Administrative Official to require a habitat assessment within Upland Wildlife
14 Habitat Conservation Areas. Futurewise files no objection to this action.

15 **Conclusion:** The Board finds and concludes Yakima County, with Ordinance 1-2011, has
16 enacted legislation to achieve **compliance** with the GMA, RCW 36.70A.060(2) and .172(1).

17 V. ORDER

18 Based upon the foregoing, the Board finds and concludes:

19 1. Yakima County has enacted legislation to achieve compliance with the GMA, and
20 therefore, the Board issues a **finding of compliance** in regards to the following issues:

21 Case 08-1-0008c

22 Issue 2 – Critical Aquifer Recharge Areas (CARAs) -- Protection Subissue

23 Issue 14 – Non-Agricultural Accessory Uses

24 Case 09-1-0014

25 Issue 2 – Administrative Discretion

26 2. Yakima County has failed to enact legislation to achieve compliance with the GMA, and
therefore, the Board issues a **finding of continuing non-compliance** in regards to the
following issues:

³⁸ June 2010 FDO at 25-26, 32.

Case 08-1-0008c

Issue 2: Critical Aquifer Recharge Areas (CARAs) – Designation Subissue

Issue 6 – CAO Exemptions

Case 09-1-0014

Issue 4 – CAO Exemptions

3. Judicial review is pending in the Court of Appeals as to the following issue, and therefore, the Board issues a **stay of the compliance proceedings**:

Case 08-1-0008c

Issue 15 – Aquatic Critical Areas – Type 5 Streams, Stream Buffer Widths, Wetland Buffer Width Adjustments.

4. The County is ordered to bring itself into compliance with the Growth Management Act pursuant to this decision and order within 180 days. The following schedule shall apply:

Compliance Due on identified areas of noncompliance	October 24, 2011
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	November 7, 2011
Objections to a Finding of Compliance	November 21, 2011
Response to Objections	December 1, 2011
Compliance Hearing (Telephonic) Call 360 407-3780 pin 805659#	December 13, 2011 10:00 a.m.

If Yakima County takes the required legislative action prior to the deadline set forth in this Order, the County may file a motion with the Board requesting an adjustment to this compliance schedule.

Entered this 27th day, April, 2011.

Joyce Mulliken, Presiding Officer

Raymond Paolella, Board Member

Nina Carter, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a petition for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy to all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).